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No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1932

PETER L. MCDONNELL, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 11–16) is reported in 59 F. (2d) 290.

JURISDICTION

The judgment of the court below was entered May 31, 1932. (R. 16.) The petition for a writ of certiorari was filed August 31, 1932. (R. 16.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 278 (e) of the Revenue Act of 1924 renders invalid waivers executed after the enactment of the Act with respect to taxes the assessment and collection of which had become barred prior to the effective date of the Act.

2. Whether a waiver of the statute of limitations applicable to assessment and collection of individual income tax, executed by a member of a partnership for the purpose of obtaining special assessment of the partnership's excess-profits tax, was invalid as having been executed under duress.

3. Whether an assessment in 1926 of additional income tax for the year 1917 was void under Section 274 (a) of the Revenue Act of 1926 by reason of the Commissioner's failure to notify petitioner by registered mail of his right to appeal to the Board of Tax Appeals, the assessment having been made in accordance with petitioner's own computation of the deficiency payable.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 11–13.

STATEMENT

The facts found by the Court of Claims (R. 7–11) may be summarized as follows:

The petitioner filed his individual income-tax return for the year 1917 on April 1, 1918, and paid the tax shown to be due. (R. 7.) The partnership

of McDonnell & Truda, of which the petitioner was a member, filed its return of income on Form 1065 on April 1, 1918, and paid the profits tax computed thereon under Section 209 of the Revenue Act of 1917. (R. 7.) On March 18, 1923, the Commissioner of Internal Revenue made a jeopardy assessment of excess-profits tax for 1917 against the partnership in the amount of $100,005.14. A claim for the abatement of this assessment was filed. (R. 7.)

The Committee on Appeals and Review ultimately recommended that the profits tax of the partnership be computed under the special relief provisions of Section 210 of the Revenue Act of 1917. (R. 7; see the case of *McDonnell & Truda* v. *United States*, October Term, 1932, No. 332, now pending on petition for certiorari.) Thereafter, on November 30, 1925, the Commissioner advised the petitioner that inasmuch as any reduction of the excess profits tax liability of the partnership necessarily involved a corresponding increase in the taxable net income of the partners it would be necessary for petitioner to file a waiver of the statute of limitations applicable to assessment of his individual income tax before the respective tax liabilities of the partnership and the partners could be adjusted. (R. 7.) On February 23, 1926, a waiver with respect to assessment and collection of petitioner's income tax for the year 1917 was duly executed. (R. 9.) This waiver was mailed to the

Commissioner accompanied by a letter from petitioner's attorney stating that petitioner and his copartner were desirous of paying all income taxes justly due from them, and that they had no desire to take any part of the taxes in controversy before the Board of Tax Appeals. (R. 9.)

The tax liability of the partnership was eventually settled on the basis of special assessment, and on May 22, 1926, petitioner was notified by a 30-day letter of a resulting deficiency in his 1917 income tax in the amount of $6,877.62. (R. 9, 10.) On May 26, 1926, petitioner filed a written protest against the proposed deficiency assessment, recomputing the amount due and showing a deficiency in the sum of $4,386.15. (R. 10, 11.) On July 12, 1926, the Commissioner advised petitioner that upon consideration of his protest it had been determined that his computation of the deficiency was correct and that assessment would be made accordingly. (R. 11.) On October 9, 1926, an assessment was made against petitioner in the amount of $4,386.15, and this amount, together with interest, was paid to the Collector on October 23, 1926. (R. 11.)

Petitioner filed two claims for refund alleging that the waiver was invalid, that collection was therefore out of time, and that the Commissioner had failed to comply with the statutory requirements for assessment and collection of the tax.

(R. 11.) These claims were duly rejected, and petitioner brought suit in the Court of Claims, which dismissed the petition. (R. 16.)

DISCUSSION

Petitioner contends in the first place that the waiver of the statute of limitations relating to assessment of taxes for the year 1917 was invalid under Sec. 278 (c) of the Revenue Act of 1924, *infra*, p. 12, because the period of limitation had expired prior to the effective date of that Act, and the waiver was executed after the enactment of the Act. The Court of Claims held that the waiver was nevertheless valid. The decision of the court below on this point is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Uncasville Manufacturing Company* v. *Commissioner*, 55 F. (2d) 893, where a waiver executed under substantially similar circumstances was held invalid. In the *Uncasville* case this Court denied the taxpayer's petition for certiorari, which did not, however, raise the question of the validity of the waiver, which had been decided in favor of the taxpayer. (286 U. S. 545.)

In its opinion in *Burnet* v. *Chicago Railway Equipment Company*, 282 U. S. 295, this Court said, without deciding the question (p. 300, footnote 5):

> Subdivision (e) can not be said to qualify every other subdivision in Section 278.

> Nothing indicates an intention to have it limit the effect of Section 278 (a), which permits assessment to be made or suit to be brought at any time in the case of a false or fraudulent return or a failure to file any return. * * * Nor is there any indication that it should qualify subsection (c), which provides for the giving of waivers. * * *

We submit that the decision of the court below was correct; but in view of the conflict of authorities, we do not oppose the granting of the petition so far as it relates to the first question stated, *supra*, page 2.

Although the question is narrow in its scope, and its decision by this Court will control only cases where an assessment was barred on the date of the enactment of the Revenue Act of 1924, and where a waiver consenting to a later assessment and collection of the tax was given after that date and before the date of the enactment of the Revenue Act of 1926, we are advised by the Bureau of Internal Revenue that there are 12 cases of this character pending, involving approximately $625,000 in refunds.

Petitioner also contends that the waiver was invalid by reason of duress because the Commissioner required its execution as a condition precedent to the granting of relief in the nature of special as-

sessment to the partnership of which the petitioner was a member. But it appears that there was in fact no duress. The exchange of correspondence between the Commissioner and the taxpayer and the partnership of which he was a member (R. 7, 8, 9) clearly indicates that the filing of the waivers was voluntary. The petitioner's representative and attorney in fact in forwarding the waiver to the Commissioner wrote (R. 9):

> I wish to state that it has always been the desire of these two gentlemen to pay all the income taxes justly due from them without any attempt to evade such payments by any means whatsoever * * *.
>
> * * * We have no desire to take any part of the taxes in controversy before the Tax Board and are quite eager to settle it as expeditiously as possible within the Internal Revenue Department. The waivers are sent along with this letter as evidence of good faith in order that your conferee may feel thoroughly sure that no unfair advantage is sought by groundless appeals or other delays.

Although there is no finding of the ultimate fact that the waiver was not executed under duress, we submit that the court clearly reached that conclusion, as shown in its opinion. The court below said (R. 12, 13):

> It can not be said that a waiver executed by the plaintiff in order to obtain a reduction

> in the amount of the profits tax due by the partnership through a computation under the relief provisions of the statute was executed by duress. He executed the waiver because it was to his advantage to do so. * * * He was not forced to do so and the results obtained as a result of the execution of the waiver were favorable to him.

The absence of an express finding of an ultimate fact is of no importance if the circumstantial facts as found and as construed by the opinion are such that the ultimate fact follows as a necessary inference. *United States* v. *Wells,* 283 U. S. 102, 120.

Furthermore, the circumstances in the instant case are similar to those in *Burnet* v. *Chicago Railway Equipment Co.,* 282 U. S. 295, where this Court held that a waiver given under a threat by the Commissioner of a jeopardy assessment and enforced collection, when such action would have been illegal, was not invalid because of duress.

It is further contended that the deficiency assessment was invalid because the Commissioner failed to send by registered mail a letter notifying petitioner of the assessment and of his right to appeal to the Board of Tax Appeals within sixty days as provided by Section 274 (a) of the Revenue Act of 1926, *infra,* pp. 12–13. The record shows that petitioner was advised by a thirty-day letter that the Commissioner proposed to make an additional assessment of $6,877.62 for the year 1917; that peti-

tioner filed a written protest against this assessment, recomputing the tax and showing a deficiency of only $4,386.15; and that thereafter the Commissioner advised him by letter that his recomputation had been accepted as correct and that the assessment would be made accordingly. Petitioner had previously stated in a letter dated February 23, 1926, that he had no desire to take the matter before the Board of Tax Appeals. (R. 9.) He paid the tax in the amount which he himself had admitted to be due. Section 274 (a) does not require the Commissioner to advise the taxpayer of his right to appeal to the Board, and in any event we submit that under all the circumstances the Commissioner was fully justified in assuming that the assessment was satisfactory to petitioner and that no appeal was contemplated. Petitioner's acts amounted to a waiver of the right to receive a 60-day letter. Since there is no question that notice of the final determination was actually received by petitioner, the fact that such notice was not sent by registered mail is immaterial. Moreover, the recognized principles of estoppel would seem to be applicable.

CONCLUSION

We submit that the decision of the court below with respect to the questions of duress and sufficiency of notice of the assessment was clearly correct. There is no conflict of authority on these issues. We therefore suggest that the writ, if

granted, be limited to the question of validity of the waiver under Section 278 (e) of the Revenue Act of 1924.

Respectfully submitted.

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OCTOBER, 1932.

APPENDIX

Section 278 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300 (U. S. C., Title 26, Secs. 1058, 1059, 1060, 1061, 1062), provides:

> SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time.
>
> (b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the Revenue Act of 1918 or the Revenue Act of 1921, may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.
>
> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
>
> (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any

time before the expiration of the period within which an assessment may be made.

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

Section 274 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 55 (U. S. C. App., Title 26, Sec. 1048), provides in part:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such

prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(d) The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

(f) If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279. * * *

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